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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENT DAVID CANTIN, Defendant and Appellant.	F077521 (Super. Ct. No. F17903768) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Nicholas Seymour, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Nirav K. Desai, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P. J., Peña, J. and DeSantos, J.

A jury convicted appellant Kent David Cantin of unlawfully driving a vehicle (Veh. Code, § 10851, subd. (a)/count 1)[1] and receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)/count 2). In a separate proceeding, Cantin admitted two prior unlawfully driving a vehicle convictions, a prior strike conviction (Pen. Code, § 667, subds. (b)–(i)), and four prior prison term enhancements (Pen. Code, § 667.5, subd. (b)).

On April 4, 2018, the court sentenced Cantin to an aggregate term of 12 years: a doubled upper term of eight years on his unlawfully driving a vehicle conviction, four one-year prior prison term enhancements, and a stayed term on count 2.

On appeal, Cantin contends: (1) the court committed instructional error; (2) the court committed *Yurko*[2] error; and (3) his unlawfully driving a vehicle conviction should be deemed a misdemeanor. We find merit in Cantin's second contention and that his third contention is not ripe for review, and we remand the matter to the trial court for a trial on the prior conviction allegations. In all other respects, we affirm.

FACTS

At the trial in this matter, the prosecutor presented evidence that on June 8, 2017, a trailer belonging to the Golden Valley Church in Madera Ranchos was left parked in an open lot at the church. The trailer contained bounce houses, tables, chairs and other miscellaneous items for block parties. Pastor Mansel Trimble secured the trailer by locking three padlocks on the trailer doors, a heavy tongue lock that prevented the trailer from being hooked to a vehicle, and a secondary lock on the trailer tongue. The following morning Trimble discovered the trailer was gone and immediately reported it stolen.

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[1] All further statutory references are to the Vehicle Code, unless otherwise indicated.

[2] *In re Yurko* (1974) 10 Cal.3d 857.

On June 28, 2017, at approximately 1:00 a.m., two Fresno County Sheriff's deputies saw a white pickup pulling the trailer in Squaw Valley. They followed the truck a short distance until it pulled into a private driveway. The deputies approached the truck and contacted Cantin, the driver, and Tambra Liles, his passenger. They checked the trailer's vehicle identification number and determined it was stolen. One deputy was able to open the trailer, which had been locked. Although it still contained several items, numerous items of church property were missing. The trailer also had new locks and two of the original locks that were found in the trailer had been cut with a saw.

After waiving his *Miranda*[3] rights, Cantin told the deputies that he and Liles had purchased the trailer from Liles's male friend the previous evening at a trailer park, but Cantin did not know or have any contact information for the man and he did not provide a name for him. Cantin and Liles agreed to pay $400 for the trailer but only gave the man $200. Cantin did not think the trailer was stolen. He never looked in the trailer and he was told by the seller that it contained only a tarp. Cantin, however, did not have any keys to the trailer in his possession. Additionally, while Cantin was detained in the back seat of the deputies' patrol car, Liles walked over to him and he asked her: "We bought the trailer, right?"

Jury Instructions and Closing Arguments

During a discussion on jury instructions, the court noted that the prosecutor was proceeding on the "driving prong of [section] 10851"[4] and that the verdict form had been changed to make it clear the prosecutor was pursuing that theory with respect to the

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3 *Miranda v. Arizona* (1966) 384 U.S. 436.

4 See *infra* for a more detailed explanation of the three methods in which section 10851, subdivision (a) can be violated. The two methods at issue here are taking a vehicle with the intent to permanently deprive the owner of its possession (vehicle theft) and posttheft driving of the vehicle, which does not require a taking of the vehicle.

charged violation of section 10851. Nevertheless, the court instructed the jury in the language of CALCRIM No. 1820 as follows:

> "The defendant is charged in Count 1 with unlawfully taking or driving a vehicle. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took or drove someone else's vehicle without the owner's consent; and [¶] 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time. [¶] A *taking* requires that the vehicle be moved for any distance, no matter how small. [¶] A *vehicle* includes a Trailer."

The court also instructed the jury in the language of CALCRIM No. 200 as follows:

> "Some of these instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give you a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

The court, however, did not instruct the jury that to find Cantin guilty of vehicle theft they had to find the trailer was worth more than $950, which is an element of the offense. (CALCRIM No. 1820; *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1288.)

During her initial closing argument, the prosecutor noted that the trailer was taken without permission from the church parking lot, but she did not argue or suggest that Cantin had been the one who took it from there. Later in her argument, she explained to the jury:

> "Now, I want you to focus on the word 'or' in between 'take or drive.' *We are not alleging in this case that the defendant took the trailer. That's not what's at issue.* And, in fact, when you go to the jury room and you see your verdict form for this count, it will say unlawful driving of a vehicle,[5] *unlawful driving of the trailer, because that's what we have in*

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5 The verdict form read, "We, the jury … find the defendant Kent David Cantin, GUILTY of a violation of Section 10851(a) of the Vehicle Code, a felony, UNLAWFUL DRIVING OF A VEHICLE, as charged in Count 1 of the information filed herein."

this case. We have the defendant driving the trailer without permission from Mr. Trimble." (Italics added.)

Later, in summing up her argument, the prosecutor stated:

> "Ladies and gentlemen, the evidence in this case shows that on June 28th, at the time of 1:10 a.m., *when the defendant was driving a truck that was pulling a stolen trailer, he did not have permission to drive that trailer and when he drove that trailer, he was depriving the owner, Mansel Trimble, from ownership of the trailer*, and when he received that trailer, he knew that it was stolen. I ask you to hold him accountable for his actions and find him guilty of both charges." (Italics added.)

In her closing argument, defense counsel told the jury: "We know that on June 10th or 9th the trailer was taken from the Madera church property, *and the evidence shows that no one saw who took this trailer*." (Italics added.) She also argued that Cantin drove the trailer without the intent to steal or deprive the owner of possession and without knowledge it was stolen because he purchased the trailer the evening before he was arrested.

During her rebuttal argument, the prosecutor stated:

> "You'll note that in the jury instruction which lays out the law for unlawful driving of a vehicle[,] [t]here is nothing that mentions that there's knowledge that the vehicle is stolen. *In fact, what it is, it's driving a vehicle without permission of the owner*. Mr. Trimble never gave Mr. Cantin permission, and when Mr. Cantin *drove that vehicle or that trailer*, he did so with the intent to temporarily or permanently deprive the owner of possession of the vehicle. Any moment that Mr. Cantin has the vehicle, Mr. Trimble does not. [¶] And I say vehicle in this case, and I mean trailer." (Italics added.)

At another point, the prosecutor stated:

> "Now, defense mentioned Ms. Liles, who is not here today to say. She also mentioned that, well, the deputy testified that the car wasn't driving, well, swerving or it wasn't speeding, and you'll note in the jury instruction that none of those factors that you need to look for indicate that the car must be doing something strange to catch the officer's attention. *All the person must be doing is driving, and in this case we do have driving of the trailer*." (Italics added.)

In summarizing her rebuttal argument, the prosecutor stated:

> "[T]ake your time and you'll come to the conclusion that the reasonable events of June 28th, 2017, at 1:10 a.m. were that the defendant *drove this trailer without permission of the owner with the intent to temporarily or permanently deprive him of ownership*[.]" (Italics added.)

DISCUSSION

The Instructional Error

Cantin contends the court's instruction regarding the charged violation of section 10851 allowed the jury to convict him based on either theft or driving, but did not instruct that the value of the vehicle had to exceed $950, which is an element of vehicle theft. Thus, according to Cantin, the court erred because it instructed the jury on an incorrect legal theory and the error violated his state and federal due process rights and his Sixth Amendment right to a jury. Respondent agrees the court committed instructional error, but contends the error was harmless beyond a reasonable doubt. We agree with respondent.

LEGAL PRINCIPLES

Section 10851, subdivision (a) can be violated three ways: (1) by driving a vehicle without the owner's consent with the intent "to deprive the owner of possession or ownership of the vehicle for any period of time;" (2) by taking a vehicle without the owner's consent with the intent "to temporarily deprive the owner of possession or ownership of the vehicle;" or (3) by taking a vehicle without the owner's consent with the intent "to permanently deprive the owner of possession or ownership of the vehicle." (CALCRIM No. 1820.)[6] Although the second two methods of violating section 10851,

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[6] CALCRIM No. 1820 provides, in pertinent part:

"The defendant is charged [in Count [1]] with unlawfully taking or driving a vehicle [in violation of Vehicle Code section 10851].

"To prove that the defendant is guilty of this crime, the People must prove that:

subdivision (a) involve an actual taking of the vehicle, only the third method involves a theft of the vehicle because it requires a taking with the intent to permanently deprive the owner of possession or ownership of the vehicle. (*People v. Page* (2017) 3 Cal.5th 1175, 1183 (*Page*).) Additionally, to prove a theft of a vehicle in violation of section 10851, subdivision (a) the prosecutor must show that the value of the vehicle exceeded $950 (*Id*. at p. 1188), otherwise the offense committed is misdemeanor petty theft. (*Id*. at p. 1183.)

" 'When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.' [Citations.] 'An instruction on an invalid theory may be found harmless when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary" under a legally valid theory.' " (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 857.)

ANALYSIS

The trial court, in effect, instructed the jury on two of the three methods in which section 10851, subdivision (a) can be violated: the driving method and the theft method. However, the court erred in instructing the jury on vehicle theft because it omitted two elements of that offense, i.e., that the taking had to be accomplished with the intent to permanently deprive the owner of possession or ownership of the vehicle and that the

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"<*Alternative A*—joyriding> [¶] [1. The defendant drove someone else's vehicle without the owner's consent; [¶] AND [¶] 2. When the defendant drove the vehicle, (he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time(;/.)] [¶] [OR] [¶] <*Alternative B*—taking with intent to temporarily deprive> [¶] [1. The defendant took someone else's vehicle without the owner's consent; [¶] AND [¶] 2. When the defendant took the vehicle, (he/she) intended to temporarily deprive the owner of possession or ownership of the vehicle(;/.)] [¶] [OR] [¶] <*Alternative C*—theft with intent to permanently deprive> [¶] [1. The defendant took someone else's vehicle without the owner's consent; [¶] 2. When the defendant took the vehicle, (he/she) intended to permanently deprive the owner of possession or ownership of the vehicle; [¶] AND [¶] 3. The vehicle was worth more than $950.] …."

value of the vehicle had to exceed $950. However, there is ample basis in the record to conclude that the jury based its verdict on a valid ground.

The evidence showed that Cantin was stopped by sheriff's deputies while pulling the trailer approximately 20 days after it was stolen. There was no evidence presented that supported a finding that Cantin was involved in stealing it. Further, the verdict forms provided to the jury allowed the jury to find Cantin guilty or not guilty only of "unlawfully driving of a vehicle[.]" (Unnecessary capitalization omitted.) Additionally, during her initial and rebuttal closing arguments, the prosecutor focused exclusively on convincing the jury Cantin violated section 10851 by driving the trailer without permission and in neither argument did she suggest Cantin stole the trailer or that he could be convicted of violating that section because he stole it. Defense counsel also focused her argument on the posttheft driving of the trailer. In doing so, she conceded the evidence did not establish who took the trailer and she argued Cantin drove it without the intent to steal or deprive the owner of possession and without knowledge it was stolen because he and Liles had purchased it from her friend the previous evening.

Further, "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Since the court instructed the jury that some instructions might not apply, depending on the facts they found, it can be presumed the jury convicted Cantin on the posttheft driving prong of section 10851 because there was no evidentiary basis for the jury to conclude Cantin actually stole the trailer.

Cantin contends the following circumstances show that the instructional error was not harmless beyond a reasonable doubt: (1) the prosecutor presented substantial evidence of how the trailer was stolen; (2) the prosecutor's statements alone could not salvage a legally erroneous instruction (citing *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969); (3) there was no explanation provided for the discrepancy between the

title of the verdict form and the instruction; and (4) the court did not give the jury an unanimity instruction. We disagree.

Trimble's testimony regarding the condition of the trailer the day before it was stolen was necessary to prove the trailer was stolen and that Cantin drove it without permission. Although detailed, his testimony did not implicate Cantin in the theft. Additionally, *Murtishaw* is inapposite because the instruction here was not legally erroneous; it was legally correct except for its omission of two elements of one method in which section 10851 can be violated. In any case, in addition to the prosecutor's argument, the instruction at issue here was "salvaged" by the defense's argument, the verdict form, the absence of any evidence that supports a finding that Cantin actually stole the trailer, and the court's instruction that depending on the facts found by the jury, some of the instructions might not apply. Further, an unanimity instruction or an explanation for the discrepancy between the instruction and the verdict form were unnecessary because the circumstances discussed above made it abundantly clear that the prosecutor was relying on Cantin's posttheft driving to convict him of violating section 10851. Thus, we conclude that the court's instructional error was harmless beyond a reasonable doubt. (Cf. *People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 857 [error in instructing invalid theory of violation of section 10851 prejudicial where evidence supported conviction on both invalid and valid theory].)

The Prior conviction Allegations

Cantin contends the court erred by its failure to advise him of his constitutional rights before it took his admission on the prior conviction allegations. Respondent concedes, and we agree.

Before trial, the court granted Cantin's motion to bifurcate the trial of the prior conviction allegations.

After the jury returned its verdict, the court had the jury leave the courtroom for a few minutes while it determined how defense counsel wanted to proceed on these

allegations. Defense counsel advised the court that Cantin would admit them and the jury was brought back and excused.

The court then took Cantin's admission of the prior conviction allegations without advising Cantin of any of his constitutional rights or the consequences of his plea or taking appropriate waivers of those rights.

"When a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary. (See *Boykin v. Alabama* (1969) 395 U.S. 238, 243–244 (*Boykin*).) As a prophylactic measure, the court must inform the defendant of three constitutional rights—the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers—and solicit a personal waiver of each. (*People v. Howard* (1992) 1 Cal.4th 1132, 1179; see *Boykin*, at pp. 243–244; *In re Tahl* (1969) 1 Cal.3d 122, 130–133 (*Tahl*).) Proper advisement and waiver of these rights, conducted with 'the utmost solicitude of which courts are capable,' are necessary 'to make sure [the accused] has a full understanding of what the plea connotes and of its consequence.' [Citation.]

"In *Yurko, supra*, 10 Cal.3d 857, [the Supreme Court] unanimously held that the same requirements of advisement and waiver apply when a defendant admits the truth of a prior conviction allegation that subjects him to increased punishment. … [The court] concluded that '*Boykin* and *Tahl* require, before a court accepts an accused's admission that he has suffered prior felony convictions, express and specific admonitions as to the constitutional rights waived by an admission. The accused must be told that an admission of the truth of an allegation of prior convictions waives, as to the finding that he has indeed suffered such convictions, the same constitutional rights waived as to a finding of guilt in case of a guilty plea.' [Citation.]

"[The Supreme Court] went on to say that a defendant must also be advised of 'the full penal effect of a finding of the truth of an allegation of prior convictions.' [Citation.] [It] held 'as a judicially declared rule of criminal procedure' that an accused, before

admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged an habitual criminal." (*People v. Cross* (2015) 61 Cal.4th 164, 170–171.)

The test for reversal of *Yurko* error is whether " 'the record affirmatively shows that [the guilty plea] is voluntary and intelligent under the totality of the circumstances.' " (*People v. Cross*, *supra*, 61 Cal.4th at p. 171.)

The trial court did not advise Cantin of any of his constitutional rights or consequences of admitting the prior conviction allegations. Thus, we conclude that his admission of those allegations was not voluntary under the totality of the circumstances and we will remand the matter for further proceedings.

The Receiving a Stolen Vehicle Conviction

Proposition 47, which was approved by the Electorate in 2014, reduced the punishment for several crimes that were previously punished as felonies, including receiving stolen property in violation of Penal Code section 496 if the value is $950 or less. (*People v. Romanowski* (2017) 2 Cal.5th 903, 906.) "Proposition 47 converted the offense of receiving stolen property in [Penal Code] section 496 from a wobbler to a misdemeanor." (*People v. Varner* (2016) 3 Cal.App.5th 360, 366 (*Varner*).)

Cantin contends that because Penal Code section 496 states that it applies to receipt of "any property that has been stolen" (Pen. Code, § 496, subd. (a)), the provisions of Penal Code section 496, as amended, should apply to receiving a vehicle in violation of Penal Code section 496d.[7] In *Varner* the court rejected this contention. (*Varner*, *supra*, 3 Cal.App.5th at p. 366.) However, in *Page*, *supra*, 3 Cal.5th 1175, the Supreme Court held that Penal Code section 490.2, which was added by Proposition 47 and provides a definition of petty theft that affects the definition of grand theft in Penal Code section 487 and other provisions, did not exhaustively define all the statutes to

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[7] This issue is currently before the Supreme Court in *People v. Orozco* (2018) 24 Cal.App.5th 667, review granted August 15, 2018, S249495.

which it applied. (*Page*, at p. 1184.) Cantin contends that in light of *Page*, this court should find that Penal Code section "496 is similarly not exhaustive" and that the changes to that section should apply to violations of Penal Code section 496d. Thus, according to Cantin, his receiving a stolen vehicle conviction should be reduced to a misdemeanor because there was no proof that the value of the trailer exceeded $950.

"The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion." (*Pacific Legal foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.)

As amended by Proposition 47, Penal Code section 496 provides that its ameliorative provisions do not apply to certain defendants, including those who have a prior conviction for a serious or violent felony. (Pen. Code, § 496, subd. (a).) We concluded above that Cantin was denied his *Boykin/Tahl* rights when the court took his admission of the prior conviction allegations, including the allegation that he had a prior serious felony conviction, and we will remand for a retrial of those allegations. Since it is possible these allegations may still be found true, thus rendering Cantin ineligible for the relief he seeks, this issue is not ripe for adjudication. (Cf. *People v. Johnson* (2006) 142 Cal.App.4th 776, 789, fn. 4.)

DISPOSITION

Cantin's admission of the prior conviction allegations is reversed and his sentence is vacated. The matter is remanded to the trial court for a retrial of the prior conviction allegations or to allow Cantin to admit them after he has been properly advised of his constitutional rights and the consequences of his plea and appropriate waivers of his rights have been obtained. If the prior conviction allegations are found true through a court trial or because Cantin admits them, Cantin's sentence shall be reinstated. If they

are not found true, the court shall resentence Cantin. In all other respects, the judgment is affirmed.